

**Laborers International Union of North America  
Local 464 and Terra Engineering & Construction  
Corporation and Milwaukee & Southeast  
Wisconsin District Council of Carpenters. Case  
30-CD-133**

March 11, 1991

**DECISION AND DETERMINATION OF  
DISPUTE**

**BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH**

The charge in this Section 10(k) proceeding was filed August 23, 1990,<sup>1</sup> by the Employer, alleging that the Respondent Laborers International Union of North America Local 464 (Laborers) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Milwaukee & Southeast Wisconsin District Council of Carpenters (Carpenters).<sup>2</sup> The hearing was held December 10, before Hearing Officer Rocky L. Coe.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

**I. JURISDICTION**

The Employer, Terra Engineering & Construction Corporation, a Wisconsin corporation, is a construction firm with its principal office in Madison, Wisconsin. During the past calendar year, a representative period, it purchased and received goods, materials, products, and services valued in excess of \$50,000 from suppliers located outside the State of Wisconsin. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Laborers is a labor organization within the meaning of Section 2(5) of the Act.

**II. THE DISPUTE**

***A. Background and Facts of Dispute***

The Employer has a contract with Oscar Boldt Construction Company to perform the excavation, and the sheeting work that accompanies the excavation, for a new addition at St. Mary's Hospital which is located in the city of Madison, Dane County, Wisconsin. The excavation and sheeting work was scheduled to be performed in July, August, and September 1990. The Employer assigned the sheeting work to employees rep-

resented by the Laborers, with whom it is a party to a collective-bargaining agreement.<sup>3</sup>

Sheeting normally is performed by a crew of approximately five people: an equipment crane operator for handling the sheets; another operator for handling or running the piece of equipment that is used to install the sheets; a foreman to help handle the sheets; and then normally two laborers that perform the function of hooking the sheets up so that the crane can then pick them and set the sheets and lock them together prior to driving. Each panel of the sheets is normally anywhere from 18 inches to approximately 24 inches wide. They range in lengths from 20 to 60 feet. The sheets are used to hold the earth or soil back for an excavation.

About 1 week after the sheeting work had begun, Greg Sefcik, business representative for the Carpenters, contacted the Employer's president and chief executive officer, Gary Zimmerman, and asked why carpenters were not being used to install the sheeting. Zimmerman responded that the sheeting work has always been assigned to laborers and that is who the Employer was using. Sefcik asked Zimmerman to reconsider the assignment and requested a meeting. Prior to the meeting, however, Sefcik telephoned Zimmerman to ask him to reconsider and to assign the sheeting to carpenters. When Zimmerman told Sefcik that the sheeting work would not be reassigned, Sefcik replied, "Well, it doesn't sound like you want to cooperate, and as a result, if you are not going to do that, then you don't leave me any other choice but to . . . put up some type of picket on the job."

On August 17, a meeting was held in the Employer's office with Sefcik and Ron Lemon, from the Milwaukee area, representing the Carpenters, and Business Manager Robert Niebuhr and Field Representative Tom Fisher representing the Laborers. Lemon stated that in Milwaukee, the carpenters performed all the piledriving and sheeting type of work. Lemon also informed the group that the Carpenters Council had undergone restructuring and that Madison area Carpenters were no longer independent as they had been in the past; that Madison was now under the Milwaukee jurisdiction, and "that is the way it was going to be in Madison." Lemon stated that he had been personally involved in piledriving in the past, and as far as he was concerned that was carpenters' work, and the carpenters should perform that work. The Carpenters' representatives then indicated that they would be filing a subcontracting grievance against Oscar Boldt.<sup>4</sup>

<sup>3</sup>The Employer, by virtue of a letter of assent, is a party to the collective-bargaining agreement between Madison Employers Council and Laborers' International Union of North America Local No. 464. The most recent agreement between the parties is effective by its terms from June 1, 1990, until May 31, 1993.

<sup>4</sup>On August 21, 1990, the Milwaukee & Southeast Wisconsin District Council of Carpenters filed a grievance against Oscar Boldt Construction Company

*Continued*

<sup>1</sup> All dates refer to 1990 unless otherwise indicated.

<sup>2</sup> The Carpenters did not appear at the hearing nor submit a brief.

According to Niebuhr's testimony, he first became aware that the Carpenters filed a grievance against Oscar Boldt on August 22, following a conversation with Carpenters Agent Bill Barea. Niebuhr stated that he immediately telephoned the Employer and asked for Gary Zimmerman, who was unavailable. Niebuhr's call was returned by Scott Zimmerman, the Employer's civil engineer and project manager. Niebuhr expressed his concerns regarding the Carpenters' recent attempt to put pressure on the general contractor to reassign the sheeting work for the St. Mary's Hospital project, and informed the Respondent that the Laborers "did not intend to give that jurisdiction up," and if the sheeting work was reassigned to employees represented by the Carpenters, "we would pull all our people [working for Terra on that project] and picket, or possibly both." Scott Zimmerman indicated that he understood the Laborers' position and that ended the conversation.

#### B. Work in Dispute

The disputed work is the sheeting of the excavation for an addition to St. Mary's Hospital in Madison, Wisconsin.

#### C. Contentions of the Parties

The Employer states that the disputed work belongs to employees represented by the Laborers. The Laborers claims the disputed work and admits by affidavit and at the hearing that on August 22 it threatened economic action in the form of pulling its men off the job and subsequent picketing if the Employer reassigned the work in dispute to carpenters. The Carpenters, by letter dated December 7, asserted that the disputed sheeting work is really piledriving work which belongs to it. The Carpenters are pursuing an independent subcontracting grievance against Oscar Boldt for assigning the disputed work to the Employer.

#### D. Applicability of the Statute

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute. Section 8(b)(4)(D) makes it an unfair labor practice to take coercive action with the object to "for[ce] or requir[e] any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . . ." In order to find reasonable cause to believe Section

alleging that several provisions of the 1990-1993 Carpenters' agreement had been violated.

8(b)(4)(D) has been violated, "there must be evidence that one group of employees has exerted improper pressure upon the Employer to compel it to assign certain work to that group of employees rather than to another group which also seeks the work." *Auto Workers Local 957 (General Motors)*, 239 NLRB 365, 366 (1978).

At the beginning of the dispute, employees represented by the Laborers had been assigned to perform the work in dispute. The Carpenters insisted that the work belongs to employees whom it represents and informed the Employer that its members would picket the jobsite and file a formal grievance against Oscar Boldt if the disputed work was not assigned to its members. Accordingly, there are competing claims to disputed work between rival employee groups.<sup>5</sup> In response to the Carpenters' claim of the work in dispute, the record indicates that on August 22 the business manager for the Laborers threatened the Employer that if the sheeting work on the St. Mary's Hospital project was reassigned to carpenters it would pull all its men from the project and subsequently picket the jobsite. There is no evidence that this threat was not genuine and therefore there is reasonable cause to believe that the Laborers used proscribed means to enforce its claim to the disputed work. There is no agreed-on method for voluntary resolution of the dispute to which all parties are involved.

Based on our findings above, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-on method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

#### E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

<sup>5</sup>Chairman Stephens, in agreeing that there are competing claims for the work, finds that the Carpenters' threat to picket, made in furtherance of its claim, distinguished this case from *Laborers Local 731 (Slattery Associates)*, 298 NLRB 78 (1990), in which he dissented on the ground that a union's effort to enforce a union signatory clause does not, without more, constitute a competing claim for work.

### 1. Certification and collective-bargaining agreements

There was no evidence presented that either labor organization has been certified by the Board as the collective-bargaining representative for any of the employees involved. Accordingly, this factor is not helpful in determining the dispute.

The Employer has a collective-bargaining agreement with the Laborers. Their most recent contract expires May 31, 1993. The agreement specifically mentions the disputed work in the section on "Laborers' Jurisdictional Work." (Art. VII, sec. 2(a), p. 11):

Excavations for building and all other construction; digging of trenches, piers, foundations and holes; digging, lagging, sheeting, cribbing, bracing and propping of foundations, holes, caissons, cofferdams, dams, dikes and irrigation trenches, canals, and all handling, filling and placing of sandbags connected therewith.

The Employer is not a signatory to an agreement with the Carpenters.

Under the circumstances, we find that this factor favors an award of the disputed work to the employees represented by the Laborers.

### 2. Employer preference and past practice

The Employer prefers to use the employees represented by the Laborers, and its past practice since the mid-1970s has been to use laborers to perform this type of sheeting work.

We find that the factor of employer preference and past practice favors an award to employees represented by the Laborers.

### 3. Area practice

According to the uncontradicted testimony of the Employer's president and chief executive officer, Gary Zimmerman, and Robert Niebuhr, business manager for the Laborers, the other excavating contractors in the Madison, Dane County area who were contacted, reported that all sheeting work is assigned to and per-

formed by laborers.<sup>6</sup> Therefore, this factor favors an award of the disputed work to the employees represented by the Laborers.

### 4. Economy and efficiency of operations

We find, based on the testimony of Zimmerman and Niebuhr, that utilizing the employees represented by the Laborers is more economical because of the limited amount of sheeting work to be done. The Employer can use the trained laborer who is regularly at the jobsite to perform other work functions rather than hire a carpenter for this sole operation.

Accordingly, we conclude that the factors of economy and efficiency of operations favor awarding the work to employees represented by the Laborers.

### Conclusions

After considering all the relevant factors, we conclude that employees represented by the Laborers Local 464 are entitled to perform the work in dispute. We reach this conclusion by relying on the factors of the Employer's collective-bargaining agreement with the Laborers, the Employer's preference and past practice, area practice, and economy and efficiency of operations.

In making this determination, we are awarding the work to the employees represented by the Laborers Local 464, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

### DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Terra Engineering & Construction Corporation represented by Laborers International Union of North America Local 464 are entitled to perform the sheeting work at the St. Mary's Hospital project.

<sup>6</sup>The municipal utility contractors or excavating contractors have used laborers to perform all sheeting type of work. The Milwaukee Council of Carpenters recently assumed jurisdiction in Dane County and is attempting to change the area and industry practice.